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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 320

FEDERAL TRADE COMMISSION, PETITIONER

v.

A. P. W. PAPER COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The findings, conclusions, and order of the Federal Trade Commission (R. 38–52) are not yet reported. The opinion of the Circuit Court of Appeals (R. 458–463) is reported in 149 F. 2d 424.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on June 5, 1945 (R. 464). The petition for a writ of certiorari was filed on August 13, 1945, and was granted on October 8, 1945 (R. 466). The jurisdiction of this Court rests on Section 5 of the Federal Trade Commission Act as amended,

52 Stat. 111, 15 U. S. C. 45, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether Section 4 of the Act of June 5, 1905, as amended in 1910, which gave exclusive rights to the use of the words "Red Cross" or the sign of the Greek red cross to the American National Red Cross and the Army and Navy sanitary and hospital authorities of the United States but exempted from the general prohibitions of the Act those who had lawfully used said words and emblem prior to January 1905, also exempts such prior users from the prohibitions of the Federal Trade Commission Act, as amended, even though a prior user is now found to be employing these words and symbol as an unfair and deceptive act or practice in interstate commerce.

A further question which may be presented by respondents in purported support of the judgment below is whether the Commission's order requiring respondent to cease using the Red Cross name and emblem was an abuse of the Commission's discretionary authority to determine the necessary remedy.

STATUTES INVOLVED

Section 5 of the Federal Trade Commission Act of September 26, 1914, 38 Stat. 719, as

amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45, provides in part:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> (b) * * * If upon such hearing [on the Commission's complaint] the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. * * *

Section 4 of the American National Red Cross Act of January 5, 1905, 33 Stat. 600, 36 U. S. C. A. 4 (and Historical Note), provided as follows:

> That from and after the passage of this Act it shall be unlawful for any person within the jurisdiction of the United States to falsely and fraudulently hold himself

> out as, or represent or pretend himself to be, a member of, or an agent for, the American National Red Cross, for the purpose of soliciting, collecting, or receiving money or material; or for any person to wear or display the sign of the Red Cross, or any insignia colored in imitation thereof for the fraudulent purpose of inducing the belief that he is a member of, or an agent for, the American National Red Cross. Nor shall it be lawful for any person or corporation, other than the Red Cross of America, not now lawfully entitled to use the sign of the Red Cross, hereafter to use such sign or any insignia colored in imitation thereof for the purposes of trade or as an advertisement to induce the sale of any article whatsoever. If any person violates the provisions of this section, he shall be guilty of a misdemeanor and shall be liable to a fine of not less than one nor more than five hundred dollars, or imprisonment for a term not exceeding one year, or both, for each and every offense: The fine so collected shall be paid to the American National Red Cross.

The Act of June 23, 1910, 36 Stat. 604, 36 U. S. C. 4, amended the above section by (1) omitting the last sentence and (2) substituting the following for the second sentence:

> It shall be unlawful for any person, corporation, or association other than the American National Red Cross and its duly authorized employees and agents and the army

and navy sanitary and hospital authorities of the United States for the purpose of trade or as an advertisement to induce the sale of any article whatsoever or for any business or charitable purpose to use within the territory of the United States of America and its exterior possessions the emblem of the Greek Red Cross on a white ground, or any sign or insignia made or colored in imitation thereof, or of the words "Red Cross" or "Geneva Cross" or any combination of these words: *Provided, however*, That no person, corporation, or association that actually used or whose assignor actually used the said emblem, sign, insignia, or words for any lawful purpose prior to January fifth, nineteen hundred and five, shall be deemed forbidden by this Act to continue the use thereof for the same purpose and for the same class of goods.

STATEMENT

The Federal Trade Commission, after a hearing on a complaint which it had issued against respondent under Section 5 of the Federal Trade Commission Act, made findings of fact (R. 39–49) which the court below found to have support in the evidence (R. 459). The facts thus found may be summarized as follows:

Respondent manufactures and distributes throughout the United States various brands of toilet tissues and paper towels. Among these are brands which respondent designates as "Red

Cross Toilet Tissue" and "Red Cross Towels." Respondent began marketing the former in 1897 and the latter in 1933 and it widely advertises both of them in periodicals of national circulation. On each package or roll of such toilet tissue and towels, a Greek red cross and the words "Red Cross" are prominently displayed.[1] Respondent also features the cross and the trade name in its magazine advertisements, and it carries on its letterheads the words "Makers of Red Cross Towels and Tissue", with a red cross inserted after the words "Red Cross." (R. 39–40.)

Respondent has registered with the United States Patent Office the words "Red Cross" coupled with the Red Cross symbol as a trade-mark used by it for toilet tissue and paper towels (R. 40; Comm. Exs. 1–3, printed following R. 358).

The American Red Cross organization now has some 15,000,000 adult members and some 14,000,000 junior members, and there is an active chapter in almost every county in the United States (R. 45–46). The name "Red Cross" and the emblem of the Greek red cross on a white background have long been familiar to the American public and are associated by it with the Red Cross organization (R. 46).

[1] Samples of the rolls and packages are included in the record as original exhibits (R. 3; Comm. Exs. 7–12, R. 359–360) and have been lodged with the Clerk of this Court. The prominence given the Red Cross name and symbol in respondent's advertisement is shown by Comm. Exs. 4 and 5, printed following R. 358.

Respondent's use of the words "Red Cross" and of the Greek red cross tends to deceive a substantial portion of the purchasing public, in that the Red Cross name and symbol are understood to mean that respondent's products are sponsored, endorsed, or approved by the American National Red Cross (generally known as the Red Cross), that the Red Cross is financially interested in the sale of the products or that it uses them, that they are manufactured in accordance with sanitary standards set up by the Red Cross, or that they are in some other way connected with the Red Cross (R. 46). These mistaken beliefs are not corrected by the statement appearing on the products that they are made by respondent and that the trade name and mark are registered in the United States Patent Office (R. 47).[2] The Red Cross does not sponsor, endorse, or approve any merchandise, derive any benefit from the sale of commercial products, or set up any standards

[2] For supporting evidence, see R. 100, 156, 172, 205-206, 261, 264, 288.

[3] For supporting evidence, see R. 100, 140, 149-150, 156-157, 261, 264, 288.

[4] For supporting evidence, see R. 184, 206, 285, 288.

[5] For supporting evidence, see R. 91, 93, 103-104, 160, 277-278, 288.

[6] For supporting evidence, see R. 93, 95-97, 100, 108-109, 142-143, 176-177, 198-199, 288.

The information as to manufacture and registration of trade-mark is printed in small type and appears for the most part on the back, bottom or sides of respondent's wrappers and packages (Comm. Exs. 7-12, R. 359-360).

therefor (R. 47).[1] And the erroneous beliefs engendered by the use which respondent makes of the Red Cross name and symbol tend to cause a substantial portion of the public to purchase respondent's products (R. 49).

The Commission's findings also set forth the history and background of the American National Red Cross organization as well as the legislative provisions dealing with protection of the Red Cross name and symbol.

The organization known as the Red Cross had its origin in a treaty drafted at an international convention in Geneva, Switzerland, in 1864 (and ratified by the United States in 1882) to provide for aid to soldiers wounded in battle and for using in this connection a distinctive and uniform flag consisting of a red cross on a white background (R. 40–41, 42). Since 1881, when its predecessor was first incorporated under the laws of the District of Columbia, the American National Red Cross has used the words "Red Cross" and the Greek red cross on a white ground to identify its organization and activities (R. 43). It was incorporated by Act of Congress of June 6, 1900, 31 Stat. 277, and reincorporated by the Act of January 5, 1905, which we shall refer to as the Red Cross Act (R. 42). This Act (36 U. S. C. 1–6, 8) defines the organization's purposes and powers, establishes the manner in which the members of

[1] For supporting evidence, see R. 301–302.

its governing body shall be appointed,[3] and authorizes it to use the Red Cross emblem adopted by the Geneva convention (R. 42–43).

Section 4 of the Act (*supra*, pp. 3–4) prohibited use of the Red Cross emblem for purposes of trade by anyone not then lawfully entitled to use it and made violation of the Section a misdemeanor punishable by fine and imprisonment. These prohibitions were clarified and expanded by the Act of June 23, 1910 (*supra*, pp. 4–5). The Section as thus amended makes it unlawful for any person (other than the American Red Cross and sanitary and hospital authorities of the United States army and navy) to use the words "Red Cross" or the Red Cross emblem for any business or charitable purpose. A proviso declares that the prohibitions of the Act shall not apply to any one who had used the name or emblem for a lawful purpose prior to January 5, 1905, and who continues such use for the same purpose and the same class of goods."[4]

[3] Of the eighteen members of this body, the President appoints six, of whom he designates one as chairman and names one each from the Departments of State, War, Navy, Treasury, and Justice (R. 42).

[4] Respondent obtained registration of the Red Cross name and symbol as a trade-mark for its paper towels upon the ground that toilet tissue and paper towels are the "same class of goods" and that its use of such trade-mark for paper towels is a continuation of its pre-1905 user and therefore not prohibited by Section 4 of the Red Cross Act (R. 335, 339–340; Resp. Exs. 1-A—1-M, 2-A—2-M, R. 398–423).

The Commission concluded that the respondent's acts and practices constitute unfair and deceptive acts and practices in interstate commerce (R. 49–50). It accordingly issued an order prohibiting respondent from using the Red Cross symbol on its products and the words "Red Cross" to designate them (R. 52).

On petition to review the Commission's order, the court below held that the findings of the Commission were supported by evidence (R. 459) and that, the Red Cross Act aside, the practices found by the Commission come within the prohibitions of the Federal Trade Commission Act (R. 461). But although the Red Cross Act, by its terms, merely exempts pre-1905 users from the prohibitions of that Act, the court construed such exemption as an affirmative grant by Congress of a right of continuing use (R. 459–460). The court further held that although Congress amended the Federal Trade Commission Act in 1938 so as to prohibit, without exception, unfair or deceptive practices in interstate commerce, an implied exception to this general prohibition must be read into the later statute (R. 461). The extent of this implied exception, as ruled by the court, was that the Commission "may not absolutely forbid" use of the Red Cross name and symbol to pre-1905 users, but that it may impose other limitations on use of the name and symbol "to prevent their use in a deceptive manner" (R. 461). The Commission's order was

accordingly reversed and the case remanded to the Commission for further proceedings in conformity with the court's opinion (*ibid.*).

Judge Clark, dissenting from this holding, gave as ground therefor that the limited exception from the penal provisions of the Red Cross Act showed no "legislative intent to legalize deception of the public" (R. 462).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that the American Red Cross Act of January 5, 1905, as amended, confers upon those who had used the words "Red Cross" and its symbol prior to January 5, 1905, a right of continuing use which prevails against the subsequent prohibition, by the Federal Trade Commission Act as amended, of unfair or deceptive acts or practices in interstate commerce.

(2) In holding that the Federal Trade Commission Act does not empower the Federal Trade Commission, in the case of a corporation which had used the words "Red Cross" and the Red Cross symbol prior to January 5, 1905, and which currently employed such words and symbol as unfair or deceptive acts or practices in interstate commerce, to grant relief against such unfair or deceptive acts or practices by forbidding use of the words "Red Cross" and its symbol.

(3) In reversing the order of the Federal Trade Commission.

SUMMARY OF ARGUMENT

I

Respondents' practices fall squarely within the prohibitions of the Federal Trade Commission Act unless some exception from these prohibitions is to be found in the Red Cross Act of January 5, 1905. That Act, as amended in 1910, makes it a misdemeanor for any private person to use the Red Cross name or emblem unless he had been using the name or emblem lawfully prior to January 5, 1905. The Act thus confers no affirmative rights upon pre-1905 users, and the exemption given them from the criminal prohibitions of the Red Cross Act furnishes no basis for inferring that Congress intended that they should forever be free, respecting use of the name and emblem, from all regulatory legislation of general application which Congress might thereafter enact. Certainly no such inference may be drawn in the case of the Federal Trade Commission Act, which differs widely from the Red Cross Act in purposes, sanctions, and scope.

The purpose of the Federal Trade Commission Act is to prevent unfair methods of competition and deception of the consuming public by those engaged in interstate trade. The quite different objective of the Red Cross Act is to protect the interests of the American Red Cross and of the sanitary and hospital staffs of the Army and Navy, by preserving for their use, as provided by international treaty, a distinctive Red Cross.

emblem and the words "Red Cross". The subject matter and scope of the two statutes are equally far apart. The Red Cross Act applies to intrastate and interstate commerce, the Trade Commission Act solely to interstate commerce. The former statute absolutely prohibits, as to those covered, use of the Red Cross name or emblem; the latter statute applies only to use of the name or emblem when found to be an unfair method of competition or an unfair or deceptive practice.

When Congress recently had before it bills to bring pre-1905 users within the absolute prohibitions of the Red Cross Act, such legislation was urged as a measure necessary in order to carry out this country's treaty obligations and in order to free the Red Cross name and emblem from all association with commercial exploitation. The failure of Congress to enact these bills, urged upon such grounds, is no indication of legislative opinion or policy respecting the meaning and scope of the prohibitions of the Federal Trade Commission Act, and certainly no basis for implying an immunity from that Act. Furthermore, Article 28 of the Red Cross Convention, ratified by the Senate in 1932, imposes a solemn international obligation on this country to ban all commercial use of the Red Cross words and symbol, and no exemption should be read into the Trade Commission Act, in the name of supposed collateral legislative policy, for conduct which this country is under treaty obligation to terminate.

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II

A contention which the respondent may advance is that the deception found by the Commission would be effectively cured if respondent were required to make some qualifying statement in conjunction with the Red Cross name and emblem and that the court below therefore properly set aside the order of the Commission requiring respondent to cease using the name and emblem. But this Court has held that an order by the Commission prohibiting further use of a deceptive word in a trade name for a product should be sustained by the courts unless it appears that the Commission abused its discretion in the conclusion that no change short of excision would give adequate protection. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 81-82. The circuit courts of appeals have also consistently held that only a clear showing of abuse of discretion will justify interference by the courts with the Commission's determination of the necessary remedy. In the present case, in which findings of the Commission, supported by evidence, establish that the various limiting phrases which appeared on respondent's products did not correct the misleading impression arising from its use of the words "Red Cross" and the Red Cross sign, the Commission's order was well within its discretionary authority to determine the requisite relief.

ARGUMENT

I

THE UNFAIR OR DECEPTIVE ACTS OR PRACTICES PROHIBITED BY THE FEDERAL TRADE COMMISSION ACT INCLUDE DECEPTIVE USE OF THE RED CROSS NAME AND EMBLEM, AND NO EXEMPTION OF THOSE WHO HAD USED THIS NAME AND EMBLEM PRIOR TO 1905 IS TO BE INFERRED BY REASON OF THE EXEMPTION OF SUCH USERS FROM THE PROHIBITIONS OF THE RED CROSS ACT

The practices of the respondent, under the findings made by the Commission, fall squarely within the prohibitions of the Federal Trade Commission Act unless these prohibitions are in some way qualified or limited by reason of the prior Red Cross Act.[10] While this was assumed by the court below, consideration of the meaning and purposes of the Federal Trade Commission Act will clarify the question of the relationship, if any, between the two statutes.

As enacted in 1914, the Federal Trade Commission Act made unlawful "unfair methods of competition"[11] in interstate commerce. Practices of widely varying types may be "unfair"

[10] In *Stanley Laboratories, Inc.*, v. *Federal Trade Commission*, 138 F. 2d 388, 393 (C. C. A. 9), the court sustained an order of the Commission directed against a misleading use of the Red Cross emblem. The fact that the Red Cross Act prohibited the use made of the emblem (there being no showing of a pre-1905 use) was referred to as an additional ground for sustaining the Commission's order.

[11] Congress substituted this "broader and more flexible phrase" for the words "unfair competition" because "the meaning which the common law had given to those words was deemed too narrow." *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 310–312.

within the meaning of the Act. If consumers prefer to purchase goods made by a particular class of manufacturers, use of a trade name which imposes upon them "an exactly similar article, or one equally as good, but having a different origin," violates the Act. *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 216. Likewise, to sell a product under a name which to many purchasers denotes some other product is "unfair," whether or not the two products have equivalent characteristics; "the public is entitled to get what it chooses, though the choice be dictated by caprice or by fashion or perhaps by ignorance." *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 77, 78. A method of competition, although involving no fraud or deception, which diverts business from competitors unless they descend to a practice which they are "under a powerful moral compulsion not to adopt" also constitutes "the kind of unfairness at which the statute is aimed." *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 313.

It is no defense against use of a misleading name or label that it was adopted without fraudulent design or at a time when it was not in fact deceptive (*F. T. C.* v. *Algoma Lumber Co.*, at p. 79) or that dealers, as distinguished from consumers, are not deceived (*Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, 494). It is equally no defense that a misrepre-

sentation is "obviously false to those who are trained and experienced"; the law is for the protection of "the trusting as well as the suspicious", *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 116.[12]

Registration of a trade-mark with the United States Patent Office "does not prevent its use from falling within the prohibition of the Federal Trade Commission Act." *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission*, 143 F. 2d 676, 679 (C. C. A. 2), and cases cited. Long-continued use of a misleading trade name affords no immunity from a ban against further use.[13] "There is no bar through lapse of time to a proceeding in the public interest" under the Federal Trade Commission Act (*F. T. C.* v. *Algoma Lumber Co.*, at p. 80), and it is, of course, familiar doctrine that an exercise of the commerce power which interferes with existing contract or property rights does not constitute a taking of property without due process. *Louisville & Nash-*

[12] In *Stanley Laboratories, Inc.* v. *Federal Trade Commission*, 138 F. 2d 388, 393 (C. C. A. 9), the court said:

"The law is not made for experts but to protect the public,—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions."

[13] *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 79, 81–82; *El Moro Cigar Co.* v. *Federal Trade Commission*, 107 F. 2d 429, 431 (C. C. A. 4). The trade name in each of these cases had been used for more than 30 years.

ville R. R. v. *Mottley*, 219 U. S. 467; *New York* v. *United States*, 257 U. S. 591, 600, 601.

Under the Federal Trade Commission Act of 1914, a showing was required not only that unfair methods had been used but also that competitors were, or were likely to be, injured by the unfair methods.[11] In 1938, however, Congress amended the Act to prohibit, in addition, "unfair or deceptive acts or practices" in interstate commerce. This change was made for the purpose of prohibiting practices which "deceive and defraud the public generally," irrespective of their effect upon competitors (S. Rep. No. 221, 75th Cong., 1st sess., p. 2) and the amendment "makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor" (H. Rep. No. 1613, 75th Cong., 1st sess., p. 3). In *Pep Boys* v. *Federal Trade Commission*, 122 F. 2d 158, 161 (C. C. A. 3), the court said with reference to the amended Act that "the Commission can now center its attention on the direct *protection of the consumer* where formerly it could protect him only indirectly through the protection of the competitor."

[11] A showing of injury to particular traders was not required and, where goods sold by "unfair methods" were in active competition with others, it was proper for the Commission to infer that trade was or would be diverted from those marketing such other goods. *Federal Trade Commission* v. *Raladam Co.*, 316 U. S. 149, 152.

Had petitioner used some other words or symbol deceptively, therefore, there could be no doubt of the propriety of the order here entered by the Commission. That being so, it would be a patent anomaly to allow the respondent to continue its deceptive use of the Red Cross words and symbol in the light of the clear national policy, embodied in statute and treaty,[15] to stop private use of these marks, whether deceptive or not. We submit that this anomaly is not of Congressional making and that the court below fell into error when it read the proviso in the Red Cross Act with reference to prior users as a limitation on the power of the Commission to ban deceptive practices by such users.

The Red Cross Act does not confer any affirmative rights upon persons, like respondent, who had used the Red Cross name or emblem prior to 1905. Section 4 prohibits use of the name or emblem and provides that continuation of a lawful pre-1905 use shall not be deemed "forbidden by *this Act*."[16] The rights of the pre-1905 user are thus certainly no greater than they would have been had Congress never enacted any prohibition against use of this name and emblem. We suggest that a statute—the Red Cross Act—which itself confers no general rights but only a limited immunity furnishes no basis for reading

[15] See *infra*, pp. 20–22, 28–30.

[16] Emphasis supplied.

an exception into the prohibitions of a later statute.

The decision below rests largely upon the court's conclusion that the two statutes deal with "related subject matter" (R. 461). We submit that this conclusion is erroneous; that the two statutes are not in *pari materia;* and that, different in purpose, scope, and sanctions, they, as stated in Judge Clark's dissent, "subserve quite different ends" (R. 462).

We have already pointed out that a major objective of the Federal Trade Commission Act is to prevent deception of the consuming public by means of any unfair or deceptive practice whatever. It is a statute of general application and its prohibitions are stated in broad and inclusive terms. The Act does not deal, as such, with use of the Red Cross name or emblem any more than it deals, as such, with use of the label "Merino" or use of the words "California white pine." And, to turn to the other side of the picture, the Red Cross Act does not deal with preventing deception of consumers.

The considerations which moved Congress to adopt the Red Cross Act are set forth in its preamble, which recites that the Red Cross Convention of 1864 provided for use of the Red Cross emblem by those bringing aid to the wounded in time of war; that this treaty had been ratified by more than forty nations, including the United

States; that every country requires a permanent organization to carry out the purpose of this treaty; that such an association had been formed in this country in 1881; and that "the importance of the work demands * * * a reincorporation of the society under Government supervision."[17] The report on the bill by the House Foreign Affairs Committee states that the proposed reincorporation of the American National Red Cross "will arouse and maintain public confidence and support" (H. Rep. No. 3146, 58th Cong., 3d sess., p. 2).[18]

The sole purpose of the amendment to Section 4, adopted in 1910, was to expand the prohibitions of the Section. Only use of the Red Cross emblem for purposes of trade or in advertising the sale of goods had theretofore been prohibited, and experience had shown that this gave the Red Cross organization inadequate protection (H. Rep. No. 1256, 61st Cong., 2d sess., p. 2). It was stated that "preserving the protective powers of the symbol is of the utmost importance" and that the amendment grants to the American National Red Cross "the fullest protection it is possible to afford it by congressional enactment and at the same time

[17] 33 Stat. 599, Historical Note to 36 U. S. C. A. 1.

[18] The Senate Foreign Relations Committee did not file a report on the bill and it was passed by the Senate without debate (39 Cong. Rec. 254). In the brief debate in the House, reference was made to the fact that the prohibitions of Section 4 would not apply to existing users of the Red Cross emblem (39 Cong. Rec. 405).

amply protects the concerns possessing vested property rights in the emblem" (*idem*, pp. 2, 3).

It thus appears that the purpose of Congress in prohibiting use of the Red Cross emblem was to make this a distinctive symbol for the American Red Cross and the sanitary and medical staffs of our Army and Navy, as contemplated by international treaty. So far as the fragmentary legislative history is enlightening, the exemption granted to existing users was prompted, at least in part, by constitutional doubts as to Congressional power to prohibit continuation of an existing use. H. Rep. No. 1256, 61st Cong., 2d Sess., p. 3; 39 Cong. Rec. 404, 405; 45 Cong. Rec. 8554. The constitutional power of the Federal Trade Commission to act under the Commerce Clause being clear (see *supra*, pp. 17–18), we submit that the legislative background of the exempting proviso affords no basis for inferring a Congressional purpose to free pre-1905 users of the name and emblem from any and all regulatory legislation of general application which Congress might thereafter enact, in particular for the protection of competitors or consumers.

Not only are the two statutes which we are considering altogether different in their purposes and subject matter; but they also differ widely in

[9] The Senate Foreign Relations Committee reported the bill without explanation of its provisions (S. Rep. No. 724, 61st Cong., 2d Sess.) and the bill passed the Senate without debate (45 Cong. Rec. 7456–7457).

their application to use of the Red Cross name and emblem. The Red Cross Act applies to use in intrastate and interstate commerce; the Federal Trade Commission Act solely to use in interstate commerce. The penal provisions of the Red Cross Act, as to those covered, are absolute; the Trade Commission Act makes use of the name or emblem unlawful and subject to a cease and desist order only when it is employed as an unfair method of competition or as an unfair or deceptive act or practice. Thus, each case under the Federal Trade Commission Act must stand on the evidence peculiar to it, and it cannot be said that the Act's prohibitions, as to sellers of goods carrying the Red Cross name or emblem, cover all those pre-1905 users exempted from the prohibitions of the Red Cross Act. Misconceptions such as arise from respondent's use of the name and emblem are much more likely when, as in the present case, the words "Red Cross" and the emblem are used in conjunction and are used to designate an article connected with sanitation.[2]

The court below attached significance to the failure of Congress to enact certain proposed bills to amend the Red Cross Act so as to bring pre-

[2] These words and emblem have been registered as trade-marks, based upon pre-1905 use, for many diverse articles (Resp. Ex. 13, R. 448–457). A single page of this exhibit shows that the sign of the Greek cross or the words "Red Cross" have been thus registered as trade-marks for "hydraulic or fire hose," "elastic goring," "macaroni," "swings," "wheeled vehicles," "wind mills," and "spoons" (R. 454).

1905 users within its prohibitions (R. 460),[21] and the respondent has urged that the proceedings on these bills indicate that Congress regards the question of terminating the "rights" of such users as "solely within its own competence" (Br. in Opp. 5–6). But in view of the very different objectives and scope of the two statutes, we submit that there is no warrant for inferring, either from Congressional inaction on proposed modification of the Red Cross Act or from the statement by the House Committee (H. Rep. No. 2054, 78th Cong., 2d sess., p. 4), referred to by the court below (R. 460), to the effect "that under existing law there are legal uses of the symbol by commercial users," that Congress deems the Federal Trade Commission Act inapplicable to those in respondent's position.

Consideration of the reasons advanced for amending the Red Cross Act fortifies this conclusion. Amendment was urged as being necessary or desirable in order (1) to implement the

[21] In the 77th Congress, a bill to eliminate, over a period of time, the exemption given to pre-1905 users was favorably reported by the House Foreign Affairs Committee (H. Rep. No. 2387, 77th Cong., 2d Sess.) but Congress adjourned before the House had taken action. In the 78th Congress, the Senate passed a bill with similar provisions (90 Cong. Rec. 398, 401, 3656); the House Foreign Affairs Committee favorably reported this bill with limiting amendments (H. Rep. 2054, 78th Cong., 2d Sess.) but Congress adjourned before the bill was reached on the calendar. No bill of this nature, designed to implement the treaty, is pending before the present Congress.

Red Cross Convention of 1929 which this country had ratified and (2) to free the Red Cross name and emblem from association with commercial exploitation. Enactment of the amendatory legislation was urged by the President, upon the ground that "it seems almost a sacrilege for any person for private, material benefit to use an emblem created by international agreement solely for humane purposes"; by the Secretary of State, upon the ground that such action was called for by our obligations under the Red Cross treaty of 1929;[22] by the Secretary of War, upon the ground that indoctrinating members of the armed forces with the significance of the Red Cross insignia "is rendered more difficult by widespread and continuous display of the emblem in our own country for commercial purposes"; by the Secretary of the Navy, upon substantially the same grounds; and by the Attorney General, upon the ground that the Red Cross name and emblem are identifying symbols of a world-wide service and that every competing use thereof should therefore be excluded (Hearings before House Foreign Affairs Committee on S. 469, 78th Cong., 2d Sess., pp. 226–231).

It is not without significance that the proposed legislation, amendatory of the Red Cross Act, fell

[22] S. 469, 78th Cong., 2d Sess., and H. R. 7420, 77th Cong., 2d Sess., each bore the title: "An Act to implement article 28 of the Convention signed at Geneva on July 27, 1929, relating to the use of the emblem and name of the Red Cross."

within the jurisdiction of the House Foreign Affairs Committee and the Senate Judiciary Committee, neither of which can be presumed to have expressed an authoritative interpretation of the Federal Trade Commission Act and its amendment, which were reported by the Committees on Interstate Commerce. Cf. *Cornell Steamboat Co. v. United States*, 321 U. S. 634, 648 (dissenting opinion).

Moreover, when considering the bills to amend the Red Cross Act, Congress had before it a memorandum submitted by the company which perhaps most actively opposed the legislation; in this memorandum, the view that the existing Red Cross Act interposed no bar to proceedings under the Federal Trade Commission Act against a pre-1905 user of the Red Cross name or emblem was set forth. It was stated that:[23]

> The elimination of abuses is within the jurisdiction of the Federal Trade Commission. No complaint was ever issued by it until shortly after the introduction of H. R. 6911[24] and S. 2441. A second complaint has now been issued. There is little doubt that the Federal Trade Commission will be successful in eliminating any abuses that

[23] S. Rep. No. 597, 63d Cong., 2d Sess.; 83 Cong. Rec. 39[illegible].

[24] Hearings before a subcommittee of the Senate Judiciary Committee on S. 2441 and H. R. 7420, 77th Cong., 2d Sess., p. 105.

[25] H. R. 7420 was later substituted for H. R. 6911.

may be found in these two proceedings and any others that it may bring.

The proposed legislation would have made use of the Red Cross name and symbol by all pre-1905 users a misdemeanor. We think it clear that the failure of Congress to pass these bills, like its rejection of a ban on all basing-point systems, means only that Congress left the legality of uses of the Red Cross marks "to be determined accordingly as they might be within the reach of" the Federal Trade Commission Act "and its more restricted prohibitions." Cf. *Corn Products Co.* v. *Federal Trade Commission*, 324 U. S. 726, 737. See also *Helvering* v. *Clifford*, 309 U. S. 331, 337-338.

The courts have uniformly rejected the contention that conduct which is made unlawful by some other federal statute is impliedly excluded from the prohibitions of Section 5 of the Federal Trade Commission Act. It has been repeatedly held that Section 5 applies to a misleading labeling which constitutes a misbranding prohibited by the Food and Drug Act of June 30, 1906 (34 Stat. 768)[28] or by the Federal Food, Drug, and

[28] *Royal Baking Powder Co.* v. *Federal Trade Commission*, 281 Fed. 744 (C. C. A. 2); *Federal Trade Commission* v. *Good-Grape Co.*, 45 F. 2d 70 (C. C. A. 6); *Federal Trade Commission* v. *Morrissey*, 47 F. 2d 101 (C. C. A. 7); *Justin Haynes & Co.* v. *Federal Trade Commission*, 105 F. 2d 988, 989 (C. C. A. 2), certiorari which raised this question denied, 308 U. S. 616.

Cosmetic Act of 1938 (52 Stat. 1040).[27] Likewise this Court and other courts have held that practices constituting a violation of the Sherman Act may be proceeded against as an unfair method of competition under the Trade Commission Act.[28] If then, as has been consistently held, a statute which affirmatively bans conduct is not deemed to pre-empt all further legislative concern with that conduct, a statute like the Red Cross Act, which merely exempts some persons from its coverage, should not be held to foreclose the subsequent application of a later statute, the Federal Trade Commission Act.

Finally, we suggest that in determining whether some limitation upon the prohibitions of the Federal Trade Commission Act should be inferred as to persons exempted from the prohibitions of the Red Cross Act, Article 28 of the Red Cross treaty or convention ratified by the United States in 1932 (47 Stat. 2074) is highly relevant. Article 28 provides that (47 Stat. 2092):

> The Governments of the High Contracting Parties whose legislation may not now

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[27] *Fresh Grown Preserve Corp.* v. *Federal Trade Commission*, 125 F. 2d 917, 919 (C. C. A. 2); *Houbigant, Inc.* v. *Federal Trade Commission*, 139 F. 2d 1019, 1020 (C. C. A. 2), certiorari which raised this question denied, 323 U. S. 763.

[28] *Fashion Originators' Guild Inc.* v. *Federal Trade Commission*, 312 U. S. 457, 468; *California Rice Industry* v. *Federal Trade Commission*, 102 F. 2d 716, 720–722 (C. C. A. 9); *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321, 326–327, certiorari which raised this question denied, 323 U. S. 730.

> be adequate shall take or shall recommend to their legislatures such measures as may be necessary at all times:
>
> (a) to prevent the use by private persons or by societies other than those upon which this Convention confers the right thereto, of the emblem or of the name of the *Red Cross* or *Geneva Cross*, as well as any other sign or designation constituting an imitation thereof, whether for commercial or other purposes;
>
> * * * * *
>
> The prohibition mentioned in subparagraph (a) of the use of signs or designations constituting an imitation of the emblem or designation of the *Red Cross* or *Geneva Cross*, * * * shall take effect from the time set in each act of legislation and at the latest five years after this Convention goes into effect. After such going into effect it shall be unlawful to take out a trademark or commercial label contrary to such prohibitions.

Under this provision, respondent's use of the Red Cross name and emblem is one which the United States has explicitly agreed to prohibit, and we submit that no exemption from the Federal Trade Commission Act can be implied on the basis of supposed legislative policy in favor of conduct which this country is under solemn international obligation to terminate. Cf. *Bacardi Corporation* v. *Domenech*; 311 U. S. 150, 161–165; *Cook* v. *United States*, 288 U. S. 102, 119–120. We believe that the proviso in Section 4 of the Red

Cross Act evinces no national policy of relevance in the interpretation of the Federal Trade Commission Act, and that, in any event, whatever policy might be drawn from the proviso is counterbalanced by the considerations implicit in the 1929 Convention.

II

THE COMMISSION'S ORDER REQUIRING RESPONDENT TO CEASE USING THE RED CROSS NAME AND EMBLEM TO DESIGNATE ITS PRODUCTS WAS A PROPER EXERCISE OF THE DISCRETION VESTED IN THE COMMISSION TO DETERMINE THE RELIEF NECESSARY TO PREVENT FURTHER VIOLATION OF THE STATUTE

Respondents may contend that even if the court below erred in holding that the Federal Trade Commission Act, read in the light of the Red Cross legislation, did not empower the Commission to prohibit respondents' use of the Red Cross name and emblem, a less drastic remedy than discontinuance of respondent's use of this name and emblem would give adequate relief and that, for this reason, the judgment of the court below should be affirmed. The Government submits, in answer to such a contention, that the Commission's ruling as to the remedy clearly did not exceed the permissible limits of its discretionary authority.

In *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, the Commission found that use of the words "California white pine" to describe products of the *Pinus ponderosa* was deceptive and an unfair method of competition and entered an order prohibiting use of the word

"white" to describe such products. This Court, in sustaining the order, said (pp. 81–82) that "the Commission did not abuse its discretion in reaching the conclusion that no change of the name short of the excision of the word 'white' would give adequate protection." This decision may well be contrasted with the earlier decision of this Court in *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, in which the Commission's order, prohibiting the use of the words "mill" or "milling company" in the respondents' corporate and trade names, was modified to require, not an outright ban on the use of the words, but merely qualification and explanation. This course was adopted in the *Royal Milling* case because it was thought that qualifying words would be sufficient, under the circumstances, to cure the deception, the Court having noted (288 U. S. at 214) that the respondents "mix and blend different kinds of flour purchased from others."

In subsequent cases involving a misleading word or words in a trade name or trade-mark, orders of the Commission requiring discontinuance of the misleading word or words have been upheld by various circuit courts of appeals, as against the contention that an accompanying explanatory statement would adequately cure the deception, and that the Commission's order should therefore be modified. The courts have pointed out that when the misleading word is absolutely false in

its connotation, "it cannot be qualified; it can only be contradicted."[28] More recently the courts, taking note of decisions of this Court emphasizing that administrative tribunals are vested with a wide range of discretion in determining the requisite relief in matters committed to them for decision, have said that only a clear showing of abuse of discretion would justify interference by the courts with the Commission's ruling respecting relief.

The products of the present respondent have carried the name of the company and such words as "Trade Mark Reg. U. S. Pat. Off." and "Trade Mark Red Cross & Label Design Registered U. S. Patent Office by A. P. W. Paper Company, Inc., Manufacturer".[29] Since the Commission found, upon adequate evidence, that these words have not served to correct the misleading impression arising

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[28] *Federal Trade Commission* v. *Army & Navy Trading Co.*, 88 F. 2d 776, 779–780 (App. D. C.); *H. N. Housner & Son* v. *Federal Trade Commission*, 106 F. 2d 596, 597 (C. C. A. 3); *El Moro Cigar Co.* v. *Federal Trade Commission*, 107 F. 2d 429, 431 (C. C. A. 1).

[29] *Parke, Austin & Lipscomb, Inc.* v. *Federal Trade Commission*, 142 F. 2d 437, 442 (C. C. A. 2), certiorari which raised this question denied, 323 U. S. 753; *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission*, 143 F. 2d 676, 680 (C. C. A. 2); *Jacob Siegel Co.* v. *Federal Trade Commission*, 150 F. 2d 751, 756 (C. C. A. 3), petition for certiorari pending (No. 605, this Term); *Perloff* v. *Federal Trade Commission*, 150 F. 2d 757, 760 (C. C. A. 3).

[30] Comm. Exs. 7–12 (Original Exhibits), R. 359–360.

out of respondent's use of the words "Red Cross" and the Red Cross sign (*supra*, p. 7), it was certainly reasonable for the Commission to conclude that the deception of purchasers arising from such use could be effectively cured only by prohibiting use of the words and emblem. See also in this connection samples of respondent's advertisements (Comm. Exs. 4–5, printed following R. 358).

In determining what practices the law forbids, the test is what may mislead, not those who are trained and experienced, but the careless, credulous or ignorant. *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 116. Clearly the same test must be applied in determining appropriate relief. In this connection, one court has observed that:

> If the Commission, having discretion to deal with these matters, thinks it best to insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, "wayfaring men, though fools, shall not err therein," it is not for the courts to revise its judgment.[32]

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Circuit Court of

[32] *Aronberg* v. *Federal Trade Commission*, 132 F. 2d 165, 167 (C. C. A. 7).

Appeals should be reversed, with directions to affirm and enforce the Commission's order.

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Section 5 (c) of the Federal Trade Commission, 15 U. S. C. 45 (c), provides: "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission."

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